JD-72-17
Austin, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ATX INNOVATION, INC. d/b/a
TABBED OUT

Respondent

and Case 16-CA-180675

KRIS BEGLEY, an individual

Charging Party

Megan McCormick, Esq., and *Eva C. Shih, Esq.*,
for the General Counsel.
Christopher C. Antone, Esq.,
for the Respondent.
John H. Crouch, IV, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Austin, Texas on March 22, 2017. Kris Begley ("Begley" or "the Charging Party") filed the charge in Case 16–CA–180675 on July 21, 2016.[1] The Regional Director for Region 16 of the National Labor Relations Board ("NLRB" or "the Board") issued the complaint and notice of hearing on November 29. ATX Innovation, Inc. d/b/a Tabbed Out ("the Respondent") filed a timely answer on December 9, denying all material allegations in the complaint.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act") when on or about June 8, the Respondent discharged employee Begley for engaging in concerted protected activity and to discourage employees from engaging in protected concerted activities.

[1] All dates are in 2016, unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware registered corporation with operations and facilities located in Austin, Texas, engages in business as a computer software and development and applications company. The Respondent, for the 12-month period ending July 21, provided services valued in excess of $50,000 directly to points located outside the State of Texas. Therefore, I find, and the Respondent admits, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operation

The Respondent is a small corporation that develops and operates a multiple payment solution system for bars and restaurants that allows customers to close their bar tabs from their mobile devices. The Respondent's Austin, Texas location ("Austin office") is within a few miles of downtown Austin, Texas in a building with a suite of offices. Its suite is configured in an open layout, with employees seated at desks in close proximity to each other. On entering the office, there is a pod of about four to five members of the technical support team. Next is the sales/account/management marketing group. The development team is seated down the office hallway and slightly away from the rest of the office employees.

Approximately twenty people are employed by the Respondent, including a chief executive officer ("CEO"), chief technology officer, executive vice president of product, comptroller, marketing and sales staff, and marketing and sales directors/managers. Alex Broeker ("Broeker") has been the Respondent's CEO for about 4 years. He is responsible for the overall business strategy and securing funds for the company. Alicia Cook ("Cook") has been the director of personnel since July 2014, and reports directly to Broeker. During part of the period at issue, Nathan Parks ("Parks") was the technical support and implementation manager. He left the company on January 31, 2017. The following individuals were also employed by the Respondent for all or part of the relevant time period: Begley, inside account manager; Ben Carolan ("Carolan"), sales and account manager; John Smolik ("Smolik"), communications manager; Lindsey Eulenfeld ("Eulenfeld"), multiple roles in sales/account management/beverage program; Dominique Burkett ("Burkett"), creative marketing team; Jason Seed ("Seed"), Begley's manager.[3]

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[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

[3] Eulenfeld, Smolik, Burkett, and Carolan were on Begley's "team" after he was hired as an employee and full-time inside account manager. Although Seed was the manager for the team, he

B. Begley's Employment as a Contractor with Respondent

In July or August 2015, Begley submitted an online application for a contractor position in market research with the Respondent. After reviewing his resume, the chief financial officer ("CFO") at the time felt Begley was a good candidate for an account manager.[4] Consequently, on August 31, 2015, he was contracted to serve as a market researcher and junior inside account manager. In his contractor role, Begley dedicated 20% of his time performing market research under the direction of Eric Paul ("Paul"); and the remaining 20% of his time was spent conducting inside account management duties under Jen Banda ("Banda"). Due to the small nature of the company, Begley also performed different roles at various stages of his employment as a contractor, including sales force administrative work and social media coordinator.

Early in his tenure as a contractor, Begley primarily worked from his home with variable hours. However, in about January 2016, he began working from the office Tuesdays and Thursdays and occasionally on Fridays to allow for more interaction with the marketing department because of his newly acquired social media duties. Begley recorded his hours for pay purposes via a website called "Invoice Us" and copied various management officials on his reporting forms.

Although Begley was initially hired by the Respondent as a contractor, he aspired to become a full time employee.[5] Consequently, once hired as a contractor, he immediately began lobbying management for a full time position. Begley first approached Paul about his interest in full time employment at the company. Soon after his discussion with Paul, he also spoke with Banda about becoming a full time account manager at the Respondent's Chicago location. Throughout his tenure as a contractor, Begley had ongoing conversations with Parks about the Respondent's organization, Begley's contributions to the company, and Begley's desire to be hired into a full time position.

In about April, Begley also initiated discussions with Cook about acquiring a full time position at a salary of $50,000 or greater.[6] On April 19, he sent her an email summarizing their discussion and emphasized that if a full time position could not be negotiated, he wanted to remain as a contractor but with an increase in compensation. (GC Exh. 8.) In mid-May, Begley

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worked from his home in California.

[4] Begley testified that he believed for the period that he worked as a contractor, George Zirkel was the CFO.

[5] For the sake of brevity and clarity, the use of "full time" denotes a permanent full time employee who works for the Respondent at least 8 hours a day during normal business hours.

[6] Begley first testified that his initial conversation with Cook about being hired full time was in February. When presented with GC Exh. 8, however, Begley corrected his testimony to reflect that he first spoke with Cook in April 2016, about full time employment with the Respondent. (Tr. 93–94.)

also talked with Seed about his desire to be hired full time with a salary range of $55,000 to $60,000 a year.

One of the earliest conversations that he had with a coworker about the salary range for a full time account manager was in September 2015 with account manager Amanda Rice ("Rice"). He initiated the conversation with her so that if he was offered a full time account manager position with the company, he would be able to negotiate the best salary for himself. Rice informed him that he should not negotiate for a salary less than $65,000 to $70,000. In April 2016, Begley began speaking with Smolik about his salary and frustration at the length of time it was taking to become a full time employee. In about May, Smolik asked Begley about the status of his efforts to be hired for a full time position by the Respondent. Begley gave him an update and told Smolik the salary he wanted if offered a position. Smolik replied that Begley likely would not get it because, by comparison, he was making about $60,000 a year and Burkett was at approximately $50,000.

Prior to being hired full time, Begley never had a conversation with Broeker about his desired salary for a permanent position. Although Broeker was aware of Begley's desired salary prior to making him an offer for a full time position, he did not learn the information from Begley. The majority of Begley's conversations with management about a full time job offer were with Cook.

C. Begley's Request to Work at a Different Desk

On June 2, Begley asked Cook's permission to move his seat assignment which technically was not in the same pod as his team members.[7] Cook approved the move. Broeker, subsequently, told her that he wanted Begley to sit with his team. Consequently, on June 3, Cook emailed Begley to tell him that Broeker wanted him to stay in the pod with his team, and apologized for informing him that he could move his seat prior to getting approval from Broeker. (R. Exh. 2.) Begley responded to her via email that he could better interact with his team members in the area where he had moved. Cook told him to address the matter directly with Broeker. Broeker was unaware of the email exchange between Cook and Begley and never communicated directly with Begley about the location of his seating assignment.

D. On June 3, Begley Offered Full Time Employment

Respondent regularly held happy hour gatherings after work on Fridays for management and employees to socialize and decompress after a busy work week. It was at such a gathering

[7] The Respondent's employees are primarily seated in teams according to their job functions at desks that are grouped together. On entering the office, there is a pod of about four to five people in technical support. The next team of employees is sales/account management/marketing. This is Begley's group. The desks in his team were grouped four together with two desks side by side facing south and two other desks side by side facing north. Each desk was connected to another desk. Further down the hall in a quieter area is the development team.

on June 3, that Broeker offered Begley a full time inside account manager position with a starting salary of $46,000 per year.[8] Although Broeker knew Begley wanted a $50,000 salary, he instead offered him $45,000; and eventually the parties settled on a $46,000 a year starting salary. Begley did not express to Broeker that he was disappointed with the starting salary, but rather asked Broeker if they could revisit his salary in the future to which Broeker agreed. Begley asked if he had his "word on it"; and Broeker told him that Begley would "absolutely have [his] word on it." (Tr. 27.) It is also undisputed that Begley requested, and Broeker agreed to back-date the job offer to May 31, to allow Begley's health insurance to become effective immediately. The job offered to Begley was a newly created position.[9] Consequently, Broeker and Begley discussed the job duties Begley would be expected to perform. In addition to his new duties, Begley would continue to perform the same social media tasks he had as a contractor. About 20% of the job would involve social media and the remaining tasks would be account management related functions. Begley's social media responsibilities would include social media tracking and responding to tweets and Instagram posts. After they discussed the particulars of the offer and Begley accepted, Broeker told Begley, "Awesome. See you Monday morning" and Begley replied "I'll see you Monday morning." (Tr. 51–52.)

Later in the day on June 3, Cook emailed the written offer to Begley with pre-employment paperwork, which included an employee proprietary information agreement, and an offer letter to sign for the position of inside account manager. It should be noted that the employee proprietary information agreement contained an acknowledgment by the employee that "nothing in this Agreement is intended to limit employees' rights to discuss the terms, wages, and working conditions of their employment, as protected by applicable law." (R. Exh. 6.) Begley completed the emailed documents the same day. Begley acknowledged that there were additional documents that he signed at a later time as part of his hiring. (Tr. 254–255.)

After receiving and accepting the offer for full time employment, Begley told Smolik and Burkett that he was given a "low-ball" job offer of $45,000. They did not respond to his gripe. Likewise, Begley also complained to Parks that he got a "low-ball" offer.

[8] Broeker and Begley differ on a few minor points about their June 3 conversation. According to Begley, Broeker acknowledged that the salary offer was less than Begley wanted but assured him that in "about three months" after the launch of their new product, he would get Begley "definitely above what you were asking for". (Tr. 102–104.) Broeker denied making the statement and claimed the meeting ended with Begley being ecstatic about the job offer and thanking him profusely. I find that these minor contradictions are not necessary to my ruling on the merits of the case because they both acknowledge that Broeker agreed to revisit the issue of Begley's salary at a later time.

[9] As a result of several discussions with Begley about his desire for a full-time position with the Respondent, Cook spoke with Broeker about the possibility of creating a full-time position for him. Broeker gave his authorization for its creation; and ultimately Begley was offered the job.

E. Personnel Policies and Practices Regarding Time, Attendance, and Terminations

As part of his conversation with Begley about the job offer, Broeker did not discuss the company's time and attendance policies. In fact, once he was hired as a full time employee, no one gave Begley explicit oral or written instructions on the company policies for tracking his time and attendance, calling in late or absent, or defining his work schedule and whether he would work from home or in the office.

The evidence established that the Respondent does not have an employee handbook, nor are there written company policies for employees to follow when late to work (anticipated or unanticipated), requesting leave or experiencing any unanticipated absences. The Respondent has a liberal time and attendance policy. Full-time employees receive unlimited personal time off and sick leave. If an employee anticipates needing to take leave, the expectation is for the employee to notify his or her team members. Employees can utilize different mechanisms to communicate their absences to the office. There is a calendar posted in the office for employees to make everyone aware of their anticipated absences. Also, employees can use email, "Slack" (an internal company text-based system), or company shared Google calendar. Although it is not required, most employees notify the entire office if they are going to be absent from work. Full-time employees in the Austin, Texas location work from the office daily. However, if an employee wants to work from home, he or she must get approval from their manager. Last, there is no company policy on the use of profanity in the workplace, nor is there a new employee orientation or training program.

During his tenure as a contractor, Begley would notify Broeker, Cook and Seed if he was going to be absent or late. While he was a contractor for the Respondent, Begley emailed Broeker and copied Cook, Seed, Smolik and Burkett his work schedule which noted that he typically worked from home or in the "field" on Monday and Wednesday and was in the office on Tuesday, Thursday, and most Fridays. (GC Exh. 4.) Although most full time employees worked in the Austin office, unless they resided out of state, and arrived in the office before 10 a.m., as a contractor Begley was allowed to work from home. While a contractor, Begley did not have a set arrival time on the days he worked in the office but usually tried to get there by 10 a.m.

As the CEO, Broeker retained the final authority to terminate employees. Although managers are able to independently issue discipline and terminate employees, Broeker is made aware of whenever an employee is terminated. For example is the termination of former employee Kadi Mayo ("Mayo"). She was terminated on March 24, 2015, during Broeker's tenure as CEO with the Respondent. Consequently, he would have been aware of her discharge. Mayo, like Begley, was an independent contractor with the Respondent prior to being offered a full-time position. On March 12, 2015, she asked Cook when her interview for a full-time position with Ben Carolan ("Carolan"), executive vice president of sales, would be scheduled. Due to Carolan's absence from the office because of illness, on March 13, 2015, Cook informed Mayo that her interview would be scheduled for the following Wednesday. On March 16, 2015, however, Carolan told Mayo that an interview was unnecessary and offered her the position, explaining that he wanted her to start the same day. Mayo accepted the offer the same day, but informed Carolan that she already had prior commitments scheduled for that afternoon and night.

She told him that she could start the next day and would see him in the morning. Cook told Mayo that she could complete the personnel paperwork when Mayo came into work the next day. However, Mayo did not come to the office on her first day of work as a full-time employee because she was "recuperating" from her work as a bartender the previous night. Cook responded to Mayo via email that it was her understanding Mayo was to start work that day. Moreover, Cook instructed Mayo to notify her the date she is available to start work full time, and that going forward Mayo needed to inform her and Carolan if she was going to be absent. As instructed, on March 18, 2015, Mayo emailed Cook that she wanted to start her full-time employment on Monday. Mayo wrote in part,

> I'd like to get started full time Monday morning. I'm going to try and get with Eric tomorrow afternoon to wrap up our market research stuff if you'd like to sit down and talk then, or I can read over everything via email and direct any questions to you Monday morning.

(R. Exh. 7.) On March 24, 2015, Carolan emailed Mayo notifying her that the workday began at 9 a.m. and she needed to be present for a meeting scheduled to start in 2 minutes. Mayo replied that she was unaware of the scheduled meeting, and explained that she was at the local office for the Social Security Administration trying to secure documents Cook needed from her. She emailed Carolan that she could dial into the meeting or come into the office as soon as she left the Social Security Administration's office. On March 24, 2015, the Respondent notified Mayo that she was terminated.

F. Begley's First Day as a Full Time Employee on June 6

Begley's first day of work as a full time employee was on June 6. He left his home that morning about 8:45 a.m. or 8:50 a.m. in order to arrive at work by 10 a.m.[10] Prior to going into the office, at about 9:50 a.m., Begley stopped at a Whole Foods store approximately 1½ miles from the office to get coffee and carry-out breakfast. However, when he returned to his car it would not start because the battery was dead. The security guard at the store was, however, able to give his car a jump start. Consequently, at about 10:05 a.m., Begley emailed Cook, and copied Seed and Broeker, to notify them that he was waiting on a jump start for his car because the battery died; and he would have to get a new battery.[11] None of them responded to Begley's email. After his car was started, instead of going to work, Begley drove his car to a Wal-Mart about 5 minutes from his home to get a new battery.[12] He worked on his laptop while waiting for

[10] Begley testified that the normal commuting time from his house to downtown Austin was about 1 hour. While Begley also testified that it was standard practice for employees to arrive at the office by 10 a.m., I find that other witnesses provided credible and corroborating testimony that the expected arrival time was by 9:30 a.m. Nonetheless, the evidence is undisputed that Respondent did not have a written rule or policy dictating a specific arrival or departure time for employees.

[11] There was undisputed testimony that there is an automobile repair shop directly across the street from the Respondent's office and an automobile parts store about 5 miles from the office.

[12] In his email to Broeker and Cook the next morning, Begley told them that he had to have his car "towed" to Round Rock (the location of the Walmart car service shop). (GC Exh. 5.) During his hearing testimony, however, he stated that after he received the jump start to his

approximately 3½ to 4 hours for the battery replacement. The car was completed by about 1:45 p.m. After his battery was replaced, Begley went home and continued to work instead of going into the office.

G. On June 7, Begley Discusses with Cook, Broeker and Coworker Events of June 6 and/or, his Displeasure with his Salary

On June 7, Begley arrived at the office slightly before 10 a.m. When he opened his email there was a message from Cook sent that day at 9:51 a.m. asking if his car repair went well. Cook sent the email because management had not heard from Begley since his email the previous morning. She noted that new hires, such as Begley, are normally asked to arrive on their first day of work about 30 minutes prior to everyone else's start time to allow them time to sign new employee paperwork.[13] Broeker also sent Begley an email at 10:03 a.m. stating, "I wouldn't expect a car battery to take you out of the office all day. Everything okay?" (GC Exh. 5.) After composing his thoughts, Begley responded to Broeker via email, and copied Cook, noting that it took some time to get the battery replaced and asked if he was expected to work from the office on a daily basis in his new role. In response Broeker told Begley that his actions the previous day "creates poor team dynamics", and emphasized that when he was absent or working from home he should notify "the team". Id. Broeker had also expressed to Parks, via a separate email, his frustration with Begley being absent his first day of work; and his dissatisfaction with Begley's reasons for being absent. Begley ended the email chain with Cook and Broeker by writing,

> Hey Alex,
>
> In the future, I'll make sure to provide additional updates when these types of incidents come up. John [Smolik] and Dom[inque] [Burkett] are fully aware that I usually WFH [work from home] on Mondays and Wednesday. My plan for this new role is to WFH and the field more often, due to the nature of my new role. If this is a problem, maybe we should meet to establish clearer expectations for this role and my attendance in the office. I'm available all day except from 1-2pm for our Marketing Meeting. Thanks K

(GC Exh. 5.) Begley's response "pissed off" Broeker because he felt: (1) Begley was overstepping his bounds as a subordinate; (2) Begley was inappropriately trying to define his role in the company and where he would sit irrespective of Broeker's position on the subjects; and (3)

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battery he "was afraid it would die again any time [sic] I turned it off." (Tr. 113.) Later in his testimony, Begley also admitted that after getting a jump start he could have driven his car to the office's parking lot but instead wanted to "go get my car fixed." (Tr. 154.) These statements contradict his email to Cook telling her that he had to have his car towed to a place for repair. The evidence is clear that after Begley received the jump start to his car in the Whole Foods' parking lot, he actually drove it to the Walmart in Round Rock.

[13] Cook acknowledged that she did not tell Begley he needed to come to the office between 8:30 a.m. and 9:30 a.m. on his first day.

Begley was trying to usurp Broeker's role as CEO by dictating the parameters for meeting to discuss any issues Broeker might have with Begley's self-created schedule.

Sometime after the above-described email exchange with Broeker and Cook, Begley asked Smolik and Brukett if on the previous day Broeker had made inquiries of them about him. They told him that Broeker asked if they had communicated with him on June 6; and they had responded no.

Later in the day on June 7, Begley walked to lunch with a group of about six employees that included Smolik. Begley mentioned to Smolik that he felt he had received a low-ball salary offer for his current position. Smolik did not respond.

Approximately 30 minutes after he returned from lunch, Cook asked to meet with Begley in the conference room because she had been told by Parks that he was upset. She also wanted to discuss his absence the prior day. She started the discussion by telling Begley that he should have communicated better about his battery issue, and informed him that he was expected to work from the office in his new position.[14] Moreover, because Cook felt that Begley had a "kind of attitude"; and Parks had told her that Begley was disgruntled because he felt that he had received a low-ball job offer, Cook also asked Begley, "Hey, what's - - what's going on[?]".[15] (Tr. 78, 230–231.) Begley complained that he felt the salary he was offered and accepted for the position was below the local area average. She disagreed and asked him why he took the job if he was disappointed with the salary offer. After a short discussion about his displeasure with his salary, Cook asked Begley what he wanted to do about the situation. Begley told her that he wanted to "work through it." (Tr. 123, 230–231.) The conversation lasted approximately 5 minutes.

H. On June 7, Broeker Sends Begley Home for the Remainder of the Day

Following the conversation between Begley and Cook, Broeker stopped by Cook's office to ask her what was going on with Begley because he had "heard in mid-afternoon that [Begley] was being loud and disruptive…" (Tr. 249–250.) Cook told him that Begley was a little "fired up" but did not get an opportunity to tell him that Begley was unhappy with his job offer. Broeker responded to her, "Hey, don't worry about it. I got it from here." (Tr. 42, 231.)

Soon after leaving Cook's office, Broeker approached Begley and asked to speak with him outside. The discussion began with Broeker telling Begley that it had been relayed to him that he was upset and had a negative attitude. He also told Begley that his attitude was not good for their work environment; his tenure with the Respondent was not a good fit; and he was uncertain if Begley could "come back" from his actions over the past couple of days.[16] Broeker

[14] Although neither Broeker, nor Cook told Begley when he was hired that he would have to work from the office in his new role, they assumed it was implied by the very nature of the position, inside account manager. (Tr. 51–52, 241–241.)

[15] Begley admitted that Cook did not initiate the discussion about his dissatisfaction with his salary.

[16] According to Begley's testimony, he admitted to Broeker that he might have vented

ended their discussion by telling Begley to go home and he would contact him the next morning. The conversation lasted about 10 minutes.

At some point, Broeker met with Smolik and Burkett in the conference room to get their opinion on whether to retain Begley. Smolik told Broeker that he felt Begley should be terminated based 80% on his performance and 20% on his attitude. Smolik believed that Begley did not have the requisite marketing experience to perform his job without extensive "handholding" or guidance from his team members. Likewise, he felt Begley's attitude was a distraction in the office because he complained frequently and loudly about the way Broeker managed the company.[17]

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inappropriately about the salary he was offered and accepted; but also emphasized to Broeker that as a contractor for the Respondent he had worked hard and to lose a job within 3 days of being hired was heartbreaking. Broeker, however, vehemently denied that Begley told him that he was upset because he had received a low-ball job offer. Moreover, Broeker insisted that he did not become aware of Begley's displeasure with his salary until the current unfair labor practice charge was filed with the NLRB. I credit Broeker's testimony on this point because (1) Cook provided credible corroborating testimony; (2) no other employee who was aware of Begley's disappointment with his salary provided testimony that they relayed this information to Broeker; and (3) Broeker's overall demeanor while testifying appeared truthful and he provided testimony that was logical and consistent when denying knowledge of Begley's unhappiness with the job offer. Last, I find that whether Begley told Broeker that he was heartbroken because he was losing his job is irrelevant in determining whether he was discharged in violation of the Act.

[17] Broeker testified that Smolik and Burkett told him that Begley did not want to perform marketing tasks, specifically social media tracking, responding to tweets and instagram posts. Broeker further claimed that Smolik and Burkett told him that Begley was angry and uttering loud profanities in the workplace, resisted performing his assigned tasks, and did not want to sit with his teammates. Smolik denied telling Broeker or anyone else that Begley did not want to sit with this team members. I credit Smolik's testimony on this point because it is not logical to believe that he would admit to informing Broeker about two more serious infractions, but lie about something as minor as denying telling Broeker that Begley would not sit with his team. However, I find credible Broeker's testimony that Smolik told him Begley was angry and loud in the office; and did not want to perform his full range of assigned duties. I credit his testimony on these points because Smolik provided credible corroborating testimony and the General Counsel did not produce Burkett to dispute Broeker's testimony on these points. Smolik acknowledged that he felt Begley's performance began to deteriorate after he was hired full time because he started focusing more on the inside account manager tasks and neglected the marketing duties. He also testified that Begley frequently complained and cursed loudly about the way Broeker ran the office. Moreover, Smolik did not deny telling Broeker that Begley did not want to perform his full range of duties; and that he was loud and disruptive in the workplace. It also bears repeating that his recommendation to Broeker that Begley should be discharged also supports a finding that he relayed to Broeker that Begley was not satisfactorily performing his duties and his disgruntlement was a distraction in the office.

Later in the evening, Begley telephoned Smolik to tell him that he was probably going to be terminated because Broeker had accused him of having a negative attitude. He also asked Smolik what Broeker had spoken with him about earlier in the day.[18] According to Begley, Smolik did not respond to his question. The conversation lasted about 3 to 4 minutes.

I. Begley is Terminated on June 8

On the morning of June 8, Broeker called Begley to tell him that he had given more thought to whether to retain him, but needed additional time to discuss the decision with Begley's team members. The conversation lasted about 5 minutes. Approximately 2½ to 3 hours after his initial call to Begley, Broeker telephoned him again to tell him that the team agreed that Begley should be terminated.

On June 8, Begley was issued a termination letter. He also sent Begley an email cautioning him against contacting "folks". The email read in part,

> While you aren't looking for advice, I would suggest that you try to refrain from the barrage of reaching out to folks and somehow not taking responsibility for your actions that necessitated this tough decision. Of course, you are welcome to blame me/us for this should you wish but I believe will ultimately not be in your best interests when it comes to the next steps in your successful career."

(GC Exh. 6.) Begley was terminated effective June 8.

On July 10, Begley filed a claim for unemployment benefits with the Texas Workforce Commission (TWC). In response to the TWC's request for the basis for his dismissal, Begley wrote,

> CEO said I was terminated because I didn't meet the standards of teamwork and not appreciative of working for the company.

(R. Exh. 1.) During his testimony, Begley acknowledged that no one from management ever told him that he was terminated because he complained or talked about his salary with other employees.

III. DISCUSSION AND ANALYSIS

A. General Counsel Has Not Established a Prima Facie Case

The General Counsel argues that the reasons Respondent advanced for terminating Begley are pretext for discrimination, and therefore, proof that he was discharged for discussing his wages, an inherently concerted protected activity, in violation of Section 8(a)(1) of the Act.

[18]Smolik did not recall Begley asking him the question. Consequently, I credit Begley that the telephone exchange occurred.

The Respondent counters that Begley's discussion with his coworkers about his salary was not concerted protected activity because it did not relate to "a matter of common concern to other employees"; he was not "encouraging similar expressions of dissatisfaction which could lead to joint action about mutual concerns"; and he was not "seeking to initiate group behavior for any particular common objective related to employees' interest." *Parker Laboratories, Inc.* 267 NLRB 1174, 1177, fn. 10 (1983). Moreover, the Respondent insists that Begley was terminated because he failed to appear for his first day of work as a full time employee; failed, without argument, to follow a directive about his seat assignment; and refused to perform all aspects of his job duties.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009).

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line*[19] analysis to 8(a)(1) concerted activity cases that involve disputes about an employer's motivation for taking an adverse employment action against employees. *Hoodview Vending Co.*, 359 NLRB 355 (2012); *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063, 1065 (2009). The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. Under the *Wright Line* framework, as developed by the Board, the elements required for the General Counsel to show that protected activity was a motivating factor in an employer's adverse action are: (1) union or protected activity; (2) an employer's knowledge of that activity; and (3) discriminatory animus on the part of the employer. *Adams & Associates, Inc*., 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enf. 801 F.3d 767 (7th Cir. 2015). Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.*, supra, at 359. Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line*, id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

[19] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

1. Begley's actions arguably constitute concerted activity

A *Wright Line* analysis is appropriate in this case because the Respondent's motive is at issue. The General Counsel argues that Begley's discussions with coworkers about his disappointment with his salary offer is "inherently concerted" activity "regardless of whether they are engaged in with the express object of inducing group action." (GC Br. 29.) The General Counsel also notes that "An employer violates Section 8(a)(1) by prohibiting employees from discussing their compensation because of the tendency of such conduct to restrain employees' exercise of their Section 7 right to "learn about and assess . . . the salaries paid by their employer." (GC Br. 26, citing *Automatic Screw Products Co*., 306 NLRB 1072 (1992) In support of the argument that any discussion by employees about wages is "inherently concerted", the General Counsel cites *Alternative Energy Applications, Inc*., 361 NLRB No. 139 (2014), slip op. at fn. 10 and *Automatic Screw Products Co*., supra).

The Respondent counters that the General Counsel "would have the Judge paint with an overly-broad brush by holding that any gripe about wages is inherently concerted." (R. Br. 21.) According to the Respondent, the evidence establishes that Begley's discussions with coworkers about his salary were about his individual matters and engaged in to further his "own self-interest." The Respondent notes that to extend protection under the particular facts of this case would be inconsistent with a long line of Board cases, and the Board's "seminal" holdings in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986); and an improper expansion of the concept of "concerted" activity. (R. Br. 20–23.)

In *Meyers I* and *Meyers II*, the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whittaker Corp.*, 289 NLRB 933 (1988). A conversation can constitute concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. See *Sabo, Inc. d/b/a Hoodview Vending Co.*, 359 NLRB 355, 358–359 (2012).

The Board has consistently held it is unlawful for employers to prohibit employees from disclosing and discussing wage and salary information. *Hyundai America Shipping Agency*, 357 NLRB 860 (2011). Likewise, employers cannot interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them in Section 7 of the Act. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

The particular facts of this case cast doubt on whether Begley engaged in concerted activity when he griped to coworkers and management about the salary he was offered. There is no evidence, and Begley made no argument, that he was advancing a common cause with other employees or attempting to induce group action. In fact, the opposite could be concluded. Begley was hired into a position that had no comparator. In his conversations with Cook about

the local average salary range for the position, he had to go outside of the company for salary comparisons because there was no one else in the company working the same position. Moreover, the cases cited[20] by the General Counsel involve situations where the employer attempted to preclude the employees from discussing wage issues with others. However, in the case at issue, the evidence is undisputed that management never, implicitly nor explicitly, told Begley that he could not discuss salary issues with other employees. Assuming, without finding, that Begley's discussions were concerted activity, the next factor to consider is whether the Respondent was aware of his concerted activity at the time the decision was made to discharge him.

2. No knowledge of Begley's concerted activity; discharge was an adverse action

Although Broeker insists he did not become aware of Begley's salary complaints to other employees until the charge at issue was filed, it is undisputed that the day before he was terminated, Cook knew Begley had complained to other employees about his disappointment with his salary offer. Since Cook is an admitted supervisor and agent of the Respondent, the General Counsel argues that Cook's knowledge of Begley's conduct is imputed to the Respondent and cites *Jeff MacTaggart Masonry, LLC*, 363 NLRB No. 149, slip op. at 1 (2016) (citing *Dr. Phillip Megdal, D.D.S., Inc*., 267 NLRB 82, 82 (1983). However, in *Dr. Phillip Megdal* the Board refused to impute knowledge from the supervisor to the employer, writing, "when it has been affirmatively established as a matter of fact that a supervisor who learned of union activities did not pass on the information to others, we, ..., are unwilling to find that knowledge was conveyed as a matter of law. at 82. As I previously found, the evidence did not establish that Cook passed on to Broeker her knowledge that Begley had engaged in conversations about his salary with employees. Moreover, there is no credible evidence that any other employee or manager conveyed this information to Broeker. Consequently, I find that the General Counsel has failed to establish that the Respondent had knowledge of Begley's concerted activity at the time adverse action was taken against him. Last, however, it is clear that the termination constitutes an adverse employment action.

3. Begley's actions were not a substantial or motivating factor in his discharge

The final factor to consider is whether Begley's actions were a substantial or motivating factor in the Respondent's decision to terminate his employment. Upon such a showing, the Respondent then must present evidence that it would have discharged Begley even absent the protected concerted activity. See *Correctional Medical Services*, 356 NLRB 277, 278 (2010).

In its brief, the General Counsel argues that there is direct evidence of discriminatory animus as shown by (1) Broeker's alleged statement that Begley's "low balled" comment was an act that he could "not come back from"; and (2) Broeker's email to Begley, post-termination, suggesting that he refrain from speaking to other employees about his discharge. The General Counsel also contends that discriminatory animus can be inferred from (1) the timing of Begley's

[20] *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 3 (2014); *Automatic Screw Products Co., Inc*., 306 NLRB 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Triana Industries*, 245 NLRB 1258 (1979).

termination; (2) the Respondent's shifting or inconsistent reasons for Begley's discharge; (3) the Respondent's disparate treatment of Begley and its departure from past practice in discharging him; (4) the Respondent's failure to allow Begley to respond to the misconduct allegations; and (5) the Respondent's false or pretextual reasons provided for the discharge (e.g., use of expletives, failure to come into the office on June 6 and 7, argument about moving Begley's desk, and refusal to complete job duties).

The Respondent denies that Begley's salary discussion with coworkers was a factor in its decision to discharge him. Pointing to Begley's admission that no one in management ever told him that he could not discuss his salary with coworkers, nor told him that he was terminated because he complained to others about his job offer, the Respondent argues both are evidence that discriminatory animus was not a motivating factor in the decision to discharge Begley. The Respondent also contends that the following facts support a finding of no discriminatory animus in the decision to discharge Begley: (1) on his application for state unemployment benefits, Begley admitted that he was not fired for engaging in concerted protected activities; (2) Begley was treated more favorably than a similarly situated former employee; and (3) Respondent had valid reasons for terminating him (i.e., failure to appear for work on his first day, resisted sitting with his team members, refusal to perform some of his job duties).

Based on the evidence I find that the General Counsel has failed to establish the final prong of its prima facie case for the reasons discussed below.

(a) The record does not support a finding of direct evidence of discrimination

Despite the General Counsel's argument to the contrary, I find that the record does not support the allegation that "[a]fter learning that Begley told other employees that Respondent had "low-balled" him, Broeker repeatedly told Begley he wasn't sure if this was something he could come back from." (GC Br. 36.) As noted earlier in the section of the decision discussing the facts, I found that Broeker credibly testified that he was unaware of Begley's unhappiness with his salary until the current unfair labor practice charge was filed. Consequently, I do not find plausible the assertion that Broeker told Begley because of his conversations with coworkers about being "low-balled" he could not come back from it.

I also find unpersuasive the General Counsel's argument that Broeker's post-termination email to Begley suggesting that he refrain from speaking to other employees about his discharge is direct evidence of discriminatory animus. It is undisputed that Broeker emailed Begley after he was terminated and told him that it would be in his best interest to refrain from contacting "folks". Broeker testified that he wrote the email in response to complaints he had received from employees that Begley was contacting them.[21] Regardless, it has been repeatedly acknowledged throughout the record that the Respondent never instructed or blocked Begley from discussing his salary concerns with other people while he was a contractor or as a full-time employee. Likewise, Begley acknowledged on his state unemployment compensation application that he was fired for reasons other than his concerted protected activity. Based on my review of the

[21] While instructing Begley not to contact Respondent's employees might be an independent violation of the Act, it was not alleged as part of the complaint before me. Consequently, I will refrain from ruling on its merits.

record, I find that there is no direct evidence of discriminatory animus on the part of the Respondent.

(b) Timing

The General Counsel alleges that the length of time between Begley's discussions with coworkers about his salary and his discharge strongly supports a finding that discriminatory animus was a motivating factor in the Respondent's decision to terminate Begley.

Based on the evidence, I do not find the General Counsel's argument persuasive. The record shows that for several months prior to being hired as a full time employee, Begley spoke with various managers, including Cook, and employees about the salary he desired if hired full-time. He also solicited and received suggestions from employees regarding salary negotiations if offered full-time employment. Despite these discussions, the Respondent offered him a full-time position albeit at less than his desired salary. Broeker knew that Begley initially wanted a higher salary so he agreed to revisit the issue after Begley proved his worth at the company; and agreed to back date Begley's start date so he could immediately qualify for company offered health insurance. These are not the actions of a manager that harbors discriminatory animus against an employee for engaging in discussions about his compensation. Moreover, Begley was terminated quickly because it did not take management long to determine that his excuse for failing to come to work on his first day as a full-time employee was inadequate; he was resistant to performing his full range of duties; and he resisted sitting with his team members. After assessing the situation, speaking with Begley and Cook, and receiving input from Begley's team members, Broeker had all the information he needed to quickly make a decision to terminate Begley. Consequently, I do not find the timing of Begley's discharge suspicious.

(c) Shifting and/or inconsistent reasons for discharging Begley are pretextual

According to the General Counsel, the Respondent's shifting explanations for firing Begley is evidence that his discharge was motivated by discriminatory animus. The General Counsel notes that the Respondent claimed Begley was terminated for using expletives in the office; failing to come to work on June 6 and 7; arguing about moving his desk; and refusing to complete certain job duties. I do not find the General Counsel's arguments persuasive.

There is no credible evidence that Broeker based his decision to discharge Begley on his use of profanity in the workplace. The evidence is clear that at some point most, if not all, of the employees used profanity in the office without being disciplined. Broeker's concern was that he received reports from Cook and other employees that Begley was disturbing some of the employees by loudly and continuously complaining about his perception that Broeker was a poor manager and CEO. Moreover, there is no credible evidence that Broeker ever told Begley or any other employee that Begley's use of profanity in the office was the reason for his dismissal.

The General Counsel also contends that Begley's failure to come to work on June 6 and 7 were used as pretext by Respondent to support its discriminatory action. I find this argument without merit. First, there is no evidence that Broeker accused Begley of not coming to work on June 7 and then used it as a basis for terminating him. It is factually illogical because there was extensive testimony that on June 7, Broeker and Cook had conversations with Begley while he

was at work. It is true that Begley did not arrive at work on June 7 until about 10 a.m., but he worked in the office until Broeker sent him home at about 4:30 or 4:45 p.m.

The General Counsel also argues that Respondent had no basis for being upset by Begley's absence on June 6 because (1) Begley was never told that he would have to come into the office on his first day of work; (2) Respondent did not have any written policies, procedures, handbooks or directives relating to employee attendance, nor was Begley given new employee training on time and attendance procedures; (3) Begley's teammates were not concerned about his absence on June 6; and (4) neither Broeker nor Cook responded to Begley's June 6 email notifying them that his car battery had died. I likewise find this argument is without merit.

Broeker consistently testified that Begley's absence on June 6 was one of several reasons for his discharge. A confluence of incidents (Begley's absence on June 6, his complaints about sitting with his group, unwillingness to perform all of his job duties) caused Broeker to determine that hiring Begley was a mistake; and it was best to terminate their relationship before it further deteriorated. Broeker acknowledged that Begley's June 7 email response to his and Cook's queries about his absence on June 6 "pissed [him] off". Consequently, Begley's email likely accelerated Broeker's decision to discharge him.

Further, despite Begley's complaint that he was unaware that he was expected in the office on his first day because neither Cook nor Broeker told him he needed to appear, I find his testimony not credible on this point. The evidence established that on June 3, Broeker offered and Begley accepted a full-time position with a start date of June 6. In the course of this discussion, Broeker said to Begley, "I'll see you Monday" and he responded, "Great. I'll see you Monday. Thank you very much." (Tr. 248–249.) Moreover, Begley's actions show that he knew he had to go into the office his first day as a full-time employee because on June 6 he was driving there but when he stopped at the Whole Foods, which was about a mile short of the office, his battery died. Consequently, instead of getting a jump start and driving to the office or being towed to the office, he made the poor decision to make the 45 to 60 minute drive to a Walmart automobile repair shop near his home. His only reason for this decision was "[b]ecause I wanted to get my car fixed." (Tr. 154.) In his testimony, Begley also acknowledged that he knew he had to go into the office because he noted that he started driving into the office since he was now an official employee.

Independent of any other reason, I find that the facts surrounding Begley's absence on June 6 established that the Respondent's decision to discharge Begley was not motivated by discriminatory animus. On June 6, Begley made a series of bad decisions pertaining to his employment. Although his car battery died only about a mile from the office, he chose to take his car to an automobile repair shop about an hour from his job. Broeker testified that Begley's decision "didn't make any sense to any of us, about his car battery being four-tenths of a mile from the office. At 10:00, why wouldn't he come to the office[?]". (Tr. 248–249) After getting a jump start to his car from the Whole Foods' security guard, Begley could have driven it to the Respondent's parking lot and worked to get a new battery installed during his lunch break or after work. Likewise, Begley could have inquired at the automobile repair shop across the street from the Respondent's office about installing a battery while he was at work or asked a coworker to give him a jump start after work so he could drive the car to an automobile repair shop of his choice. I also note that he testified to getting a jump start from the security guard at Whole Foods and then driving his car to the Walmart near his home. However in his email that morning to Broeker and Cook, he told them that he had to have his car towed to the Walmart. These

statements are contradictory; and the General Counsel did not provide any substantive or credible evidence to reconcile these conflicting statements. Consequently, it adds to the reasons why I find Begley less than credible regarding the events that occurred on June 6.

I also reject the arguments that his teammates' disinterest in his absence and Broeker's and Cook's failure to respond to Begley's June 6 email are evidence of discriminatory motivation. Assuming as fact that Begley's teammates were unconcerned about his absence, I find that it is irrelevant. While Broeker considered their recommendations on whether Begley should be discharged, the evidence is undisputed that he was the ultimate decision-maker. Consequently, Broeker is the person whose opinion about Begley's absence mattered; and the evidence established that he was, to put it mildly, annoyed. Moreover, it was not management's responsibility to follow up with Begley after he sent Broeker and Cook an email notifying him of his car issues. As the new employee starting his first day of work, it was incumbent upon Begley to keep his supervisors or managers updated on his decision not to come into the office, but instead to work from home the remainder of the day. At no point did Begley ask if Cook or, more importantly, Broeker, would have a problem with him not coming to the office on his first day of work as a full-time employee. Cook provided undisputed testimony that the first day for a new employee, they had to sign papers related to their new job. Moreover, Broeker noted the very nature of Begley's position, inside account manager, makes it clear that he was expected to work from the office. It is clear that Begley's lone email sent to management on June 6 did not relieve him of his obligation to keep his managers updated on his whereabouts during business hours. More importantly, I find that these facts, in combination with the other evidence, establish that the Respondent's reasons for discharging Begley were neither shifting, nor false.

(d) Respondent did not depart from past practice or treat Begley disparately

The General Counsel argues that assuming Begley used expletives in the office, "the evidence shows that discharging Begley for doing so constitutes clear disparate treatment." (GC Br. 39.) I previously found, however, that there is no credible evidence establishing that Broeker based his decision to discharge Begley in whole or in part on his use of profanity in the office. He did consider complaints from other employees that Begley was loud and disruptive in the office. Begley's use of profanity, however, would have been secondary to this behavior. Consequently, I find that the General Counsel's argument fails on this point.

Second, the General Counsel contends that terminating Begley for failing to come to work his first day as a full-time employee "makes it abundantly clear that Respondent treated Begley disparately and that his swift termination marked a departure from its past practice." (GC Br. 40.) The General Counsel points to the Respondent's treatment of Mayo, noting that her job offer was not rescinded until she had twice failed to start work. According to the General Counsel, Begley's swift discharge was in contrast to the treatment Mayo received. Moreover, the General Counsel contends that his discharge also "marked a departure from its past practice" because unlike Mayo, Begley (1) was never given instructions on procedures to follow for notifying management of absences; (2) notified Cook and Broeker immediately when he realized his battery died; and (3) was nevertheless terminated despite the Respondent's failure to reply to Begley's email that his battery died and inform Begley to come into the office; and the Respondent had knowledge of Begley's regular work-from-home schedule.

The Respondent counters that Begley was treated more favorably than Mayo for committing the same offense. According to the Respondent, Mayo was terminated on her first day of employment for failing to come into the office; but unlike Begley that was the sole reason for her termination. The Respondent also argues that Broeker took more time in considering Begley's termination than he did in discharging Mayo.

I find the General Counsel's arguments unpersuasive. First, Mayo is not a similarly situated comparator because she was discharged by Carolan and not Broeker. There was undisputed testimony that while Broeker was aware of all terminations that occurred, managers had independent authority to discipline and terminate employees. Such was the situation in the matter at hand. The evidence established that Carolan made the decision to terminate Mayo. There is no evidence that, other than being aware of the action, Broeker played a role in the decision to discharge Mayo. Consequently, Mayo is not a similarly situated comparator to Begley. Assuming arguendo that Mayo and Begley are similarly situated, the evidence shows that Begley was not treated disparately, nor did management deviate significantly from past practices in firing him. Unlike Mayo, Broeker told Begley that he was contemplating discharging him because of his actions over the past couple of days. Instead of terminating Begley on the spot, like Mayo, Broeker sent Begley home and told him he would give more thought to his decision. Moreover, Broeker solicited input from Begley's teammates before making the decision to discharge him. There is no evidence that the same action was taken regarding the decision to fire Mayo. Likewise, the evidence clearly shows that the Respondent did not deviate from its past practice of discharging employees who failed to come to work on their first day of full-time employment. Both Mayo and Begley were fired for the same offense; except, the evidence shows Begley may not have been terminated but for his email response to Broeker, his complaints about Broeker's management style, his resistance to sitting with his teammates and performing his full range of duties, and his teammates' recommendation that he be discharged.

I previously addressed, and dismissed without merit, the General Counsel's argument that the following is evidence of the Respondent's discriminatory motivation: Begley not given instructions on time and attendance procedures; him notifying Cook and Broeker when his battery died but they did not respond and tell him to come into the office; and the Respondent being aware of his work-at-home schedule as a contractor.

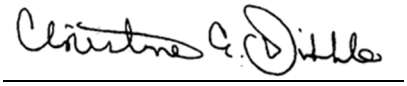
(e) Begley was allowed to respond to the allegations

The General Counsel argues that during his meeting with Begley on June 7, Broeker did not address Begley's absence from work the previous day or the allegation that he used profanity in the office. Consequently, Begley, according to the General Counsel, was not afforded the opportunity to respond to the "misconduct" allegations. (GC Br. 41–42.) I find this argument is without merit. Again, I have previously found that Begley's use of profanity in the office was not a factor in the Respondent's decision to terminate him. Consequently, whether he was allowed to address the issue in his discussion with Broeker is inconsequential. Moreover, Begley was given an opportunity to address the issue of his absence on June 6, when both Cook and Broeker sent him emails on June 7 asking why he did not come to work the previous day. I also find it difficult to believe that during their discussion about Broeker's disappointment with their

working relationship, Begley, if not told, did not ask for specific reasons why Broeker was considering terminating him. Consequently, I find nothing in the record to support a finding that Begley was not allowed to address the reasons for his dismissal and even if true, that this is evidence of discriminatory motivation.

Based on the above and the record, I find that the General Counsel has failed to prove the final prong of its *prima facie* case. Accordingly, I find that based on the evidence, the Respondent's discharge of Begley does not violate Section 8(a) (1) of the Act. I recommend, therefore, that the complaint be dismissed.[22]

Dated: Washington, D.C. September 19, 2017



Christine E. Dibble (CED)
Administrative Law Judge

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.